

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff,

vs.

Case No. 2006-1844-FH

KELVIN JAMES TYREE,  
  
Defendant.

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OPINION AND ORDER

The People have filed a motion to amend the information and add a charge of unarmed robbery.

I

Defendant is charged with larceny from the person, contrary to MCL 750.357, and assault or assault and battery, contrary to MCL 750.81(1). Following a preliminary examination before the Hon. Joseph F. Boedeker, Judge of the 39-A District Court, defendant was bound over for trial. The only charges contained in the initial complaint, and considered by the lower court, were for larceny from the person and for assault or assault and battery.

II

In support of this motion to amend the information, the People argue that the prosecutor is entitled to add charges as long as defendant will not be unfairly prejudiced or surprised. The People contend that the prosecutor may amend the information to charge defendant with unarmed robbery since "[a]ll of the elements necessary for unarmed robbery were included within the testimony" adduced at the preliminary examination. The People aver that defendant



will not be unfairly surprised or prejudiced by the addition of this new charge since he was present at the preliminary examination and heard the testimony supporting the new charge.

In response, defendant claims that the charges against him during the preliminary examination were for misdemeanor offenses,<sup>1</sup> while unarmed robbery is a 15-year felony. Defendant argues that the People cannot conduct a preliminary examination on a lesser charge and subsequently seek to amend the information to a greater charge.

### III

As a general rule, “[a]n information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination.” MCL 767.42(1). However, an information is not restricted to the charges contained within the complaint or warrant, but may be framed with reference to the facts presented at the preliminary examination. *People v McGee*, 258 Mich App 683, 690-691; 672 NW2d 191 (2003); citing *People v Hunt*, 442 Mich 359, 363; 501 NW2d 151 (1993).

At any time before, during, or after trial, a court has discretion to “permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant.” MCR 6.112(H). As such, a court has discretion to amend an information to include an uncharged cognate offense. *People v Adams*, 202 Mich App 385; 509 NW2d 530 (1993). Even where the charged offense and the offense sought to be added have dissimilar elements, the court may allow an amendment of the information so long as no unfair surprise or prejudice result. *McGee, supra* at 692. A trial court’s decision to allow amendment of the

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<sup>1</sup> This contention is incorrect; larceny from the person is a felony, punishable by up to 10 years imprisonment. See MCL 750.357.

information will not be overturned absent an abuse of discretion. *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005).

In the case at bar, no charge of unarmed robbery was previously filed against defendant, defendant has never had a preliminary examination on this particular charge, and defendant has never waived his right to a preliminary examination on this charge. However, the testimony presented at the preliminary examination clearly supports a charge of unarmed robbery. The elements of unarmed robbery are: (1) the felonious taking of any property which may be the subject of larceny from the person or presence of the complainant, (2) by force, violence, assault or putting in fear, (3) while not armed with a dangerous weapon. *People v Denny*, 114 Mich App 320,323-324; 319 NW2d 574 (1982). Complainant testified that defendant "ball[ed] up his fists" and instructed complainant to give him his money. Complainant testified that he complied with this demand because he "got really scared." Therefore, testimony regarding the elements of unarmed robbery was presented during the preliminary examination.

Despite his assertion that adding the charge of unarmed robbery would be unduly prejudicial, defendant has not suggested that his attorney would have done anything differently during the preliminary examination. Since the Court is not convinced that allowing the prosecution to add the charge of unarmed robbery will cause defendant to suffer from unfair surprise, inadequate notice, an insufficient opportunity to defend, or other prejudice, the People's request to add the charge of unarmed robbery against defendant is properly granted.

#### IV

Based on the foregoing, it is hereby

ORDERED the People's motion to amend the information to include the charge of unarmed robbery is GRANTED.

Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

SO ORDERED.

DATED:

Cc: Steven R. Fox  
David Haugan

Peter J. Maceroni,  
Circuit Judge

**PETER J. MACERONI**  
CIRCUIT JUDGE

AUG 29 2006

A TRUE COPY  
CARMELLA SABAUGH, COUNTY CLERK

BY: *R. M. M. M.* Court Clerk